IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATE : 01.12.2006

CORAM

THE HONOURABLE MR.JUSTICE K.MOHANRAM

A.S.No.676 OF 1993

1.V.K.Jaishankar
2.Mrs.Vijayalakshmi .. Appellants / Defendants 1 and 2.

Vs.

1.G.Nambirajan

2.Thanjavur Bank Ltd.,
Arcot, Rep. By its
Branch Manager.

3.Indian Bank,
Arcot, Rep. By its
Regional Manager,
Vellore. .. Respondents / Plaintiff 2
Defendants 3 and 4.

prayer: This appeal has been filed against the judgment and decree, dated 28.04.1993, passed in O.S.No.123 of 1991 on the file of the Subordinate Judge, Ranipet, North Arcot Ambedkar District.

For Appellants : Mrs.J.Sudha for Mrs.S.Hemalatha
For Respondents: Mr.S.N.Ravichandran (for R1)
Mrs.K.Padmaja for R.3
No Appearance for R.2

JUDGMENT

The defendants 1 & 2 in O.S.No.123 of 1991 on the file of the Sub-Court, Ranipet, are the appellants in the above appeal. For the sack of convenience the parties are referred to as per their ranking in the suit.

2. The case of the plaintiff as putforth in the plaint is as follows:-

The plaintiff is the son of one Ganesan and Thilakam @ Thilajkavathi. The 'A' schedule property and other properties were owned and possessed by the plaintiff's father till his death i.e., on 7.5.1986. The plaintiff's mother died on 02.12.1978. The plaintiff has succeeded to the 'A' schedule property as the sole legal heir of the deceased Ganesan. The plaintiff is being taken care of by his maternal aunt Dr.Vimala Saminthan,

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the next friend. While alive, the plaintiff's father Ganesan had taken safety locker with the 3rd and/or 4th defendant Bank and has kept his valuables therein. The second defendant is the daughter of the another sister of the plaintiff's mother and she has no manner of right over the 'A' schedule property. The first defendant is the husband of the second defendant. The second defendant has been putforth by the first defendant as adopted daughter of Ganesan. But, the second defendant is not the adopted daughter and she was not taken in adoption by the Ganesan. The second defendant was only taken care of by the plaintiff's father and mother as she was an orphan. The defendants 1 & 2 do not have any right over the 'A' schedule property. It is the case of the plaintiff that the second defendant in her letter dated 10.08.1986 written to Dr.Vimalasaminathan, sent in response to a lawyer notice, dated 31.07.1986, had admitted that she was only brought up by Ganesan and his wife and the properties of Ganesan will go only to the plaintiff. The first defendant by fraudulent means was claiming right to the suit property by obtaining legal heir certificate. Since the first defendant is attempting to get the contents of the locker of the 3rd and/or 4th defendant-Banks, the plaintiff issued a legal notice dated 31.07.1986 to the third defendant not to allow the first and second defendants to open the locker. The 3rd and/or 4th defendant are not permitting the plaintiff also to open the locker and they are insisting the plaintiff for production of succession certificate. It is the further case of the plaintiff that defendants 1 & 2 have trespassed into the 'A' Schedule property after the death of the plaintiff's father. Hence, the suit has been filed for declaration of the plaintiff's right over the suit schedule property and for other reliefs.

3. The first defendant has filed a written statement, which has been adopted by the second defendant. In the written statement, the defendants 1 and 2 have denied the allegations contained in the plaint. It is the specific case of the defendants 1 & 2 that the second defendant is the adopted daughter of the deceased Ganesan and Ganesan died intestate leaving behind his minor son, the plaintiff, and the second defendant as his legal heirs to his estate. Therefore, the second defendant is entitled to an equal share in the suit property. The suit has been filed only at the instance of the next friend. The letter referred in para 7 of the plaint is a fabricated one. The second defendant never tried to open the Bank locker, but the next friend attempted to open the Bank locker and having failed in her attempt, caused the filing of the suit. The allegations that the defendants 1 & 2 have trespassed into the 'A' schedule house is denied and it is stated that the second defendant is living in the house as the daughter of Ganesan. The first defendant, as the husband of the second defendant, is also living with her in the same house. On the above pleadings the defendants sought for dismissal of the suit.

4. An additional written statement has also been filed by the first defendant contending that the plaintiff is not the sole legal heir of the

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deceased Ganesan and the second defendant is entitled to half share and therefore, the plaintiff is not entitled to a decree in respect of the plaint 'B' schedule mentioned properties and the second defendant is entitled to a share in the same.

5. The fourth defendant has filed a written statement contending that the fourth defendant is an unnecessary party to the proceedings. It is stated in the written statement that the deceased Ganesan hired a safety locker in the Indian Bank, Arcot Branch (previously Bank of Tanjore Ltd.,) and the fourth defendant was not aware of the rest of the plaint averments. Further, since there is a dispute between the plaintiff and the defendants 1 & 2, the fourth defendant was not able to permit any of them to open the safety locker and however, he is prepared to abide by the decree that may be passed in the suit.

6. The trial Court framed the follows issues:-

a) Whether the plaintiff alone is entitled to 'A' schedule property?

b) Whether the second defendant is the adopted daughter of Ganesan?

c) Whether Defendants 1 & 2 have trespassed into the property as claimed by the plaintiff?

d) Whether the second defendant has got any right?

e) Whether the plaintiff should have filed the suit after obtaining the legal heir certificate?

f) Whether the plaintiff is entitled for the relief prayed for in the suit?

g) To what relief the plaintiff is entitled?

7.During the trial, Dr.Vimala Saminthan, the next friend, has been examined as P.W.1 and on the side of the plaintiff Ex.As.1 to 14 have been marked. On the side of the defendants, the second defendant has been examined as D.W.1 and two other witnesses have been examined and Ex.Bs.1 to 12 have been marked.

8. The trial Court on a careful consideration of the evidence on record, decreed the suit as prayed for. Being aggrieved by that, the defendants have filed the above appeal.

9. Heard the learned counsel on either side. The learned counsel for the appellants/defendants 1 & 2 submitted that the Court below has not properly considered the various documents especially Ex.Bs.5 to 7, wherein the second defendant/2nd appellant herein has been described as daughter of the deceased Ganesan. The learned counsel further submitted that Ex.Bs.8 to 10 clearly shows that the second defendant/2nd appellant herein has been shown as the daughter of Ganesan and similarly, in Ex.B.1-ration card the second defendant/2nd appellant herein has been shown as the daughter of Ganesan. The learned counsel submitted that when there is enough documentary evidence to show that the second defendant/2nd

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appellant herein was treated by deceased Ganesan as his daughter, the Court below should have accepted the plea of the defendants 1 & 2 that the second defendant is the adopted daughter of Ganesan. The learned counsel further submitted that though the requirements of Section 11(vi) of the Hindu Adoptions and Maintenance Act, 1956 (hereinafter referred to as the Act) are not satisfied in this case, the fact that the plaintiff himself has stated in the plaint that the second defendant was taken care of by Ganesan and his wife as the second defendant was an orphan, coupled with the other documentary evidences available on record, will show that the second defendant was adopted as the daughter of Ganesan. The learned counsel further submitted that the actual giving and taking of the second defendant by the natural parents and adoptive parents is not mandatory.

10. Per contra, the learned counsel for the first respondent herein/plaintiff submits that it is settled law that any adoption pleaded by the parties should be specifically pleaded and proved by acceptable evidence that the adoption was strictly in accordance with the provision contained in Section 11(vi) of the Act. The learned counsel further submitted that the mere mentioning or describing of the second defendant as the adopted daughter of the deceased Ganesan in various documents is not sufficient to prove the factum of adoption. The learned counsel further submitted that the trial Court has considered both oral and documentary evidences available on record and rightly came to the conclusions that adoption pleaded by the second defendant has not been established.

11. I have carefully considered the submissions made on either side, the evidence on record and the reasonings of the Court below for arriving at the conclusion that the second defendant is not the adopted daughter of the deceased Ganesan. The only point that arises for consideration in the above appeal is whether the second defendant has proved her case by acceptable evidence that she was adopted by the deceased Ganesan as his daughter.

12. For deciding the above point, it will be useful to refer the provision contained in Section 11(vi) of the Act. Section 11(vi) of the Act reads as follows:-

> "Section 11:- In every adoption, the following conditions must be complied with:-
>
> i) .....
> ii) .....
> iii).....
> iv) .....
> v) .....
> vi) the child to be adopted must be actually given and taken in adoption by the parents or guardian concerned or under their authority with intent to transfer the child from the family of its birth (or in the case of an abandoned child or a child whose parentage is not known, from the place or

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family where it has been brought up) to the family of its adoption.

13. In the decision reported in 2006(8)SCC 367 (M.Gurudas and others Vs. Rasaranjan and others), which is relied upon by the learned counsel for the first respondent, it is observed by the Honourable Apex Court at para 26 as follows:

> "To prove valid adoption under Hindu Law, it would be necessary to bring on record that there had been an actual giving and taking ceremony."

If Section 11(vi) of the Act is considered, in the light of the law laid down by the Honourable Apex Court in the above said decision as well as in the light of the settled principles of law, it can be safely stated that the giving and taking of the child is the sine quonon or the mandatory requirement for a valid adoption. It is not essential that giving and taking should be in any particular form. All the same, the formality of giving and taking the child should be observed. It is not essential to have a formal ceremony. No particular form is prescribed for the ceremony, but the law requires that the natural parent shall hand over the adoptive girl and the adoptive parent shall receive her. The parents after exercising their volition to give and take the girl in adoption may both or either of them delegate the physical act of handing over the girl or receiving her as the case may be to a third party. In this regard it is useful to refer the decision reported in AIR 1961 SC 1378 (Laxman Singh Vs. Rup Kumar), wherein it has been observed as follows:-

> "The law may be briefly stated thus: Under the the Hindu Law, whether among the regenerate caste or among Sudras, there cannot be a valid adoption unless the adoptive boy is transferred from one family to another and that can be done only by the ceremony of giving and taking. The object of the corporeal giving and receiving in adoption is obviously to secure due publicity. To achieve this object it is essential to have a formal ceremony. No particular form is prescribed for the ceremony, but the law requires that the natural parent shall hand over the adoptive boy and the adoptive parent shall receive him. The nature of the ceremony may vary depending upon the circumstances of each case. But a ceremony there shall be, and giving and taking shall be part of it. The exigencies of the situation arising out of diverse circumstances necessitated the introduction of the doctrine of delegation; and, therefore, the parents, after exercising their volition to give and take the boy in adoption, may both or either of them delegate the physical act of handing over the boy or receiving him, as the case may be, to a third party."

The above statement of law now stands reflected in the provisions contained in Section 11(vi) of the Act.

14.In the decision reported in AIR 1970 SC 1286 (Devi Prasad Vs. Tribeni Prasad), it is observed that the giving and receiving of child are

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absolutely necessary to the validity of an adoption and for a valid adoption all that the law requires is that the natural father shall be asked by the adoptive parent to give his child in adoption and the child shall be handed over and taken for this purpose.

15.In AIR 1974 SC 2161 (Kartar Singh Vs. Surgan Singh), it has been observed as follows:

> "The words in Section 11, clause (vi) of the Act "with intent to transfer the child from the family of its birth to the family of its adoption" are merely indicative of the result of actual giving and taking by the parents or guardians concerned referred to in the earlier part of the clause. Where an adoption ceremony is gone through and the giving and taking takes place there cannot be any other intention. The parties did not intend to go through a play acting or to put up a show. They obviously intended to comply with the requirement of law that for a valid adoption there must be giving and taking."

16. The very act of giving and taking is in itself symbolic of transplanting the adopted child from the family of its birth to the adoptive family. Therefore, it is clear that if the act of giving and taking is lacking the adoption is invalid. In the light of the above legal principles, if the case on hand is considered it has to be pointed out that, as rightly contended by the learned counsel for the first respondent, the appellants/defenfants 1 & 2 have not even avered in the written statement that there had been an actual giving and taking ceremony and the actual parents of the second defendant/second appellant herein gave her in adoption to Ganesan and his wife and they in turn took the second defendant/2n appellant herein in adoption. Therefore, in the absence of such specific pleading in the written statement, the oral evidence adduced by the appellants herein/defendants 1 & 2 to prove the adoption could not be looked into. It is settled law that any amount of oral evidence in the absence of pleadings, cannot be looked into.

17. The trial Court has elaborately considered the oral evidence D.Ws.1 to 3 and Ex.Bs.1 to 12 and has pointed out that in Ex.Bs.5 to 9, the second appellant/second defendant has not been described as adopted daughter of Ganesan. D.W.3 has been examined and through her Ex.Bs.10 to 12 have been marked, in that documents the second appellant has been described only as the daughter of Ganesan. D.W.2 in his evidence deposed that he is not aware of the actual relationship between the second defendant and Ganesan. Ex.Bs.2 to 4 do not help to prove the adoption. The above said aspects have been considered by the trial Court. Since the person, who has written Ex.B.2-betrothal agreement has not been examined and the other persons who have signed in Ex.B.2 have also not been examined and though Genesan was alive on the date of writing of Ex.B.2, he had not signed in Ex.B.2, the trial Court has not placed reliance on the same. The trial Court has pointed out that the second defendant herself

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in her evidence has stated that though in Ex.B.2 it has been mentioned that she has been described as adopted daughter, she do not know whether she was given in adoption. For the above said reasons, the trial Court has come to the conclusion that the appellants herein/defendants 1 & 2 have not proved the factum of adoption of the second appellant by Ganesan. The trial Court has also applied the correct principles of law to the facts of the case in deciding the issue of adoption. Since the trial Court has considered all the relevant aspects and the evidence on record, the contention putforth by the appellants herein are liable to be rejected. The appellants have neither pleaded that the second appellant was adopted by Ganesan as per the provision contained in Section 11(vi) of the Act nor adduced any legal evidence to show that the giving and taking ceremony took place. Therefore, this Court sees no reason to interfere with the findings of the trial Court.

18. For the reasons stated above, the appeal fails and the same is dismissed accordingly. However, there will be no order as to costs.

Sd/-
Asst. Registrar.

/true copy/

Sub Asst. Registrar.

ssv

To
1. The Subordinate Judge, Ranipet.[With records].

2. The Record Keeper, VR Section, High Court, Madras.

+ 1 CC To Mr.S.N.Ravichandran, Advocate SR NO.59520

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